No. 628

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE INTERSTATE COMMERCE COMMISSION, J. M. KURN AND JOHN G. LONSDALE, TRUSTEES, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL., APPELLANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

STATEMENT AS TO JURISDICTION

No. 161

COLUMBUS AND GREENVILLE RAILWAY COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA INTERSTATE COMMERCE COMMISSION, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND ILLINOIS CENTRAL RAILROAD COMPANY, DEFENDANTS

JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The Interstate Commerce Commission, J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, and the Illinois Central Railroad Company, defendants, respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

A. STATUTORY PROVISIONS

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended

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by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, section 35, 31 Stat. 85; April 30, 1900, c. 339, section 86, 31 Stat. 158; March 3, 1909, c. 269, section 1, 35 Stat. 838; March 3, 1911, c. 231, sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938).

B. THE STATUTE OF A STATE OR THE STATUTES OR TREATY OF THE UNITED STATES, THE VALIDITY OF WHICH IS INVOLVED

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

C. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVISED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED

The decree sought to be reviewed was entered on August 17, 1942. The petition for appeal was presented and allowed on October 14, 1942, together with the assignment of errors.

D NATURE OF CASE AND RULINGS BELOW

This is an appeal from the decree of the District Court for the Northern District of Mississippi, Eastern Division, entered August 17, 1942, enjoining, annulling, and setting aside an order of the Interstate Commerce Commission dated January 3, 1942, in a proceeding known as Docket No. 28590, *Columbus & Greenville Ry. Co. Cottonseed Allowances.* The proceeding before the Commission involved the validity of a certain tariff of the Columbus & Greenville Railway (Columbus & Greenville Ry. Co.'s freight tariff 9–B, I. C. C. No. 81), which provided in substance, inter alia, that where cottonseed is transported by a railroad *other* than the Columbus & Greenville to a mill point and is there processed and its product substantially reshipped over the lines of the Columbus & Greenville and its connections to an interstate destination under tariffs providing a joint rate of the Columbus & Greenville and such connecting lines, the Columbus & Greenville will make a prescribed refund to the shipper from the

mill point, measured by the weight of the shipment and the length of the movement inbound to the mill point. This refund is referred to as a "cut-back" rate.

By its report and order of January 3, 1942, the Commission condemned the tariff as in violation of sections 1 (6), 6 (4) and 6 (7) of the Interstate Commerce Act and directed the Columbus & Greenville Railway to cancel said tariff. The effective date of this order was subsequently extended to April 28, 1942. The basis for the order of the Commission was, in substance, that the tariff operated as a reduction in the outbound joint rate without the concurrence of all the carriers parties to such rate. A tariff of the Columbus & Greenville Railway providing a similar "cut-back" rate had previously been condemned by the Commission in a proceeding known as I. & S. 4599, *Allowances on Cottonseed at Columbus & Greenville Railway Points*, 238 I. C. C. 309. The record and report of the Commission therein were made part of the record in the later proceeding, from which the instant case has developed.

On April 3, 1942, the Columbus & Greenville Railway, pursuant to the provisions of section 41 (28) and sections 43 to 48, inclusive, of Title 28, U. S. C., filed a complaint naming as defendants the United States, the Interstate Commerce Commission and the two railroads who were inter-

veners before the Commission, namely, St. Louis-San Francisco Railway Company and Illinois Central Railroad Company. This complaint prayed that the court issue an interlocutory and temporary restraining order suspending and restraining the operation, enforcement, and execution of the Commission's order of January 3, 1942, and upon final hearing for an order permanently enjoining, setting aside and annulling said order.

Answers to the complaint were filed by the respective defendants and the case was heard upon final hearing on April 24, 1942, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220). The record before the Commission was offered and received in evidence and the matter argued by the several parties. Thereafter, on the same day, the court entered an order temporarily restraining the enforcement of the Commission's order pending final decision on the merits.

The fundamental question involved was whether the Commission had erred in holding that the tariff in issue was in violation of sections 1 (6), 6 (4), and 6 (7) of the Interstate Commerce Act.

Thereafter, by opinion filed July 31, 1942, the lower court held that the tariff of plaintiff Columbus & Greenville Railway was a valid tariff and not in contravention of any of the provisions of the Interstate Commerce Act and that the order

of the Commission requiring plaintiff to cancel said tariff was without authority in law. The final decree granting plaintiff the relief sought was entered on August 17, 1942. It is this decree that is here sought to be reviewed.

The question presented by this appeal is a substantial one. It involves an interpretation and application of sections 1 (6), 6 (4), and 6 (7) of the Interstate Commerce Act in relation to the publication and establishment of joint rates. Aside from the local situation immediately affected, the decision of the lower court has established principles relating to the publication of joint rates which will have far-reaching effect. Since these principles are contrary to the well-recognized concept of joint rates, it is important that the Supreme Court pass finally upon them.

E. CASES SUSTAINING THE SUPREME COURT'S JURISDICTION OF THE APPEAL

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541;

United States v. *Lowden*, 308 U. S. 225;

Hudson & Manhattan R. Co. v. *United States*, 313 U. S. 98; and

Interstate Commerce Commission v. *Railway Labor Executives Association*, 315 U. S. 373.

F. OPINION AND DECREE OF THE DISTRICT COURT

Appended to this statement is a copy of the opinion and a copy of the decree of said court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated October 14, 1942.

(s) DANIEL W. KNOWLTON,
Chief Counsel.

(s) DANIEL H. KUNKEL,
Attorney for Interstate Commerce Commission.

(s) JOHN E. MCCULLOUGH,
For J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company.

(s) ERLE J. ZOLL, JR.,
For Illinois Central Railroad Company.

Filed this 15 day of October, 1942.

HUBERT D. STEPHENS, JR.,
Clerk.

By (s) RUTH WEST, D. C.

No. 161

COLUMBUS & GREENVILLE RAILWAY COMPANY

v.

THE UNITED STATES OF AMERICA ET AL.

THREE JUDGE COURT

Before HOLMES, Circuit Judge, and DAWKINS and MIZE, District Judges

MIZE, District Judge.

The validity of the order of the Interstate Commerce Commission requiring the plaintiff, C. & G. Railway Company, to cancel certain provisions of a cut-back rate tariff is posed for determination by this suit. The Commission found plaintiff's freight tariff 9–B I. C. C. No. 81 to be in violation of sections 1 (6), 6 (4), and 6 (7) of the Interstate Commerce Act. The basis for the Commission's action is contained in two reports, being I. & S. Docket No. 4599, 238 I. C. C. 309, and No. 28590 decided January 3, 1942. The last-mentioned report being the one that is particularly in controversy, the record and report of the former being made part of the record in the latter.

The facts in the case are not in dispute. The tariff provisions which the Commission has condemned, provide that when cottonseed is tranported by a railroad other than the C. & G. Rail-

way Company to a mill point and is there processed and its products subsequently reshipped over the line of C. & G. Railway Co., the C. & G. Railway Co. will make a prescribed refund to the shipper, based upon the in-bound shipment and the length of movement from the origin to milling point. This provision is contained in plaintiff's tariff No. 81, being Item 5 thereof, and which provides that it shall be applicable on cottonseed in carloads from stations on the C. & G. Railway and on cottonseed from stations on connecting lines via such lines to mill points on the C. & G. Railway where in both cases subsequent shipment of the product is made from such mill points via the C. & G. Railway. Item 40 of the tariff provides for a scale of rates based upon the distance of the in-bound movement.

The effect of this tariff is that the schedule of rates prescribed is used as a measure for making refunds on the subsequent reshipments of the product out of the mill point and is not applied in the first instance upon the in-bound movements. On in-bound movement a local rate is charged and collected and subsequently upon shipment out of the mill point over the C. & G. Railway the C. & G. Railway Company refunds to the shipper the difference between the local rate in-bound and the rate prescribed in tariff No. 81, depending upon the length of the in-bound movement. This tariff is applied on all in-bound movements by rail, whether such transportation is performed by the C. & G. Railway Company or any other carrier serving the mill point. The line of the C. & G. Railway Co. lies wholly within the State

of Mississippi. Movement of cottonseed products from any of the mill points on its lines to points outside of the State of Mississippi involves movement over the line of the C. & G. Railway and the connecting carrier. The C. & G. Railway Co. has joint rates on cottonseed products in effect from origin on its line to destination reached by connecting carriers, and such joint rates are properly concurred in by all participating carriers.

The report of the Commission shows that the investigation was instituted upon its own motion concerning the lawfulness of the rates. The St. Louis-San Francisco Railway Co. and the I. C. Railroad Co., competitors of the C. & G. Railway Co., intervened in the hearing. Each of these interveners has a tariff substantially identical with the tariff of plaintiff, except that the tariff of each of these provides for a cut-back only upon cottonseed products processed from cottonseed originating in-bound on the lines of such carrier. The rates for the in-bound movements of cottonseed are published in tariffs local or joint governing the movement to the mill point. The rates on cottonseed products from the mill point are published in tariffs local or joint governing the movement from the mill point.

It is the contention of the plaintiff that the rate provided in the tariff is reasonable, just, not discriminatory, and that it is necessary in order to meet the competition of the trunk line carriers, and that the amount of freight paid by the shipper when moving out-bound products over plaintiff's line is identically the same as it would be if the products moved out over its com-

petitors' lines; that unless this tariff is permitted to stand, plaintiff, of course, is unable to meet the rate in effect by its competitors; that the processed products of the cottonseed became free freight at the mill points and the plaintiff is entitled to compete for free freight upon substantially equal terms with its competitors. That tariff No. 81 is not a joint tariff.

Interveners object to the tariff upon the theory that it attempts to name rates for account of their lines without their concurrence. That (1) their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point; (2) to permit plaintiff's tariff to remain would, in effect, permit it to charge a less rate than that shown by its joint tariff and without concurrence of those carriers concurring in the joint rate.

The testimony shows without dispute that this tariff is profitable to plaintiff; that by its provisions and enforcement none of the capital investment of plaintiff is impaired; that the connecting carriers receive the entire proceeds from the rates as published applicable to them; and that plaintiff absorbs the entire amount of this cut-back. The testimony shows, too, that it does not vary in any respect whatsoever from the published tariff.

The tariff sets up a procedure by which the shipper of the out-bound products are required to file through the claim channels of plaintiff the original bill of lading upon the in-bound cottonseed within fifteen months and that then, in accordance with this tariff, the refund is made. The Commission did not find that the tariff was un-

reasonable, unjust, or discriminatory, but determined that the form and manner in which the tariff is published does not conform to the requirements of Section 6 (4) and 6 (7) of the Act, and that it was unlawful by virtue of Section 1 (6) of the Act. The Commission was without power to declare the tariff unlawful unless it found from the evidence as a fact that the tariff was in violation of 6 (4) or 6 (7) or otherwise violated 1 (6).

The court is without power to review the Commission's conclusions of fact. *Interstate Commerce Commission* v. *Delaware, etc., Railway*, 220 U. S. 235. The legal effect of evidence, however, is a question of law, and when there is no dispute in the facts, the matter is then to be determined by the court as a matter of law. *Interstate Commerce Commission* v. *L. & N. Railway Co.*, 227 U. S. 88; *U. S.* v. *C. M., St. Paul & Pacific Ry. et al.*, 294 U. S. 499. The carrier retains the primary right to make rates but if after a hearing they are shown to be unreasonable, it is then the duty of the Commission to set them aside and require the substitution of just for unjust rates. *Interstate Commerce Commission* v. *L. & N., supra.*

The purposes of the Interstate Commerce Act are clearly stated in *Interstate Commerce Commission* v. *B. & O. Railway Co.*, 145 U. S. 265. Among others mentioned, one of the purposes was to prohibit unjust discrimination in the rendition of like service under similar circumstances and conditions, and to prevent undue or unreasonable preference to persons or localities, but that it was not designed to prevent competition between different roads, and that it was not all discrimina-

tions or preferences that fall within the inhibition of the statute, only such as are unjust or unreasonable.

The freight that was sought to be captured by plaintiff's tariff was free freight and plaintiff, by any lawful means, had the right to endeavor to receive it. *Atchison, T. & S. F. Ry. Co.* v. *U. S.*, 279 U. S. 768. Under this authority the competitors of plaintiff had no more right to recapture the freight because they brought the cotton seed in than does plaintiff have the equal right to compete for it upon equal terms. The shipper is entitled to a free choice of carriers upon substantially the same terms. In *T. & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, the court stated: "The traffic thus secured was remunerative to the Railway Company and was obviously beneficial to the consumers at the place of destination, who were those enabled to get their goods at lower rates than would prevail if this custom of through rates were destroyed. * * * The Commission did not charge, or find that the local rates charged by the defendant company were unreasonable. * * * The very terms of the statute that charges must be reasonable, that discrimination must not be unjust, or that preference or advantage to any particular person, firm, corporation, or locality must not be undue or unreasonable necessarily implied that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, shoud be considered by a tribunal appointed to

carry into effect and enforce the provisions of the act." Carriers have a right to initiate rates as long as they do not violate the terms of the Act. The Act itself leaves common carriers as they were at the common law. They make special rates looking to the increase of their business, as long as they publish and file their rates and otherwise conform to the Act of Congress. *Interstate Commerce Commission* v. *C. G. M. Ry. Co., et al,* 209 U. S. 108; *U. S. et al.* v. *I. C. Ry. Co., et al.,* 263 U. S. 515; *U. S., et al.* v. *C. M., St. Paul & Pacific Ry. Co., et al.,* 294 U. S. 499. The plaintiff, by publishing the condemned tariff, was not seeking any advantage. It was only seeking equality in order that the shipper might have a choice of routes to be determined by him upon a substantial equality. His good faith in this respect was not questioned. His motive was pure. Without this tariff his right to compete for this outbound freight is destroyed. "The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions and that such action does not amount to undue discrimination." *T. & P.* v. *U. S.,* 289 U. S. 627. The report of the Commission states: "The purpose of making the refund is to enable it to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating lines held themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move outbound products over their lines. If it were not for the cut-back rates on the connecting lines, there would be no necessity for respondent's tariff, as the inbound

shipments move from origin points to the mills at the local rates under separate bills of lading." The report states further that the refunds or cutback are exactly the same in amount as those of the other carriers serving the mill points. The report further states that the legality of the interveners' tariffs is not in issue.

We think the legality of the interveners' tariffs, while not necessarily in issue, is very material to a correct solution of the validity of the plaintiff's tariffs. The legality of interveners' tariffs is not questioned by anyone and it is assumed that they are valid until declared invalid. They have been in existence since 1931 and were adopted by the competitors for the purpose of meeting truck competition, as is shown by the report of the Commission, Division 3, in Docket No. 4599, I. & S. D. No. 459.

A clear analysis of plaintiff's tariff demonstrates that it in no wise affects the amount of the rates paid for the inbound service to the mill point. It does not affect the outbound rate of connecting carriers. But the refund is absorbed entirely by the plaintiff. There is no other carrier a party to plaintiff's condemned tariff. The tariff, in substance, is essentially the same as that of the intervening trunk lines, and if it were not for those tariffs of the intervening trunk lines, then there would be no necessity for the plaintiff's tariff, and probably it never would have been promulgated.

Shippers pay the full amount of freight as published on the inbound movements over any of the roads. Likewise on the outbound movements the full amount of freight is paid and by the terms

of the tariff is in no way affected. The effect of the condemned tariff is that when the processed products are shipped over C. & G.'s road, it will absorb a part of the inbound freight charges as published by its tariff, upon compliance with the procedure therein contained. The Plaintiff is therefore entitled to the relief sought.

Appearances: Forrest B. Jackson, Jackson, Mississippi, R. C. Stovall, Columbus, Mississippi, Z. P. Hawkins, Columbus, Mississippi, Counsel for Columbus & Greenville Ry. Co.; Daniel H. Kunkel, Office of Chief Counsel, Interstate Commerce Commission, Washington, D. C., Counsel for Interstate Commerce Commission; Robert L. Pierce, Special Attorney, Department of Justice, Washington, D. C., Counsel for United States of America; John E. McCullough, 1025 Frisco Building, St. Louis, Missouri, Counsel for St. Louis-San Fran. Ry. Co.; Erle J. Zoll, Jr., 135 E. 11th Place, Chicago, Illinois, Counsel for Illinois Central R. R. Co.

GULFPORT, MISSISSIPPI.

July 31, 1942.

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